

INTERIOR BOARD OF INDIAN APPEALS

State of Kansas v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

36 IBIA 164 (05/30/2001)

STATE OF KANSAS,	:	Order Vacating Decision
Appellant	:	and Remanding Case
	:	
v	:	
	:	Docket No. IBIA 01-59-A
ACTING SOUTHERN PLAINS REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee	:	May 30, 2001

This is an appeal from a December 20, 2000, decision of the Acting Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), to take a tract of land in Jackson County, Kansas, into trust for the Prairie Band of Potawatomi Indians (Tribe). For the reasons discussed below, the Board vacates the Regional Director's decision and remands this matter to him for further consideration.

The Tribe purchased the tract at issue in 1997. On January 14, 1999, by Resolution PBP 99-09, the Tribe asked BIA to take the tract into trust, stating that it contained 120 acres, was located within the Tribe's present reservation, and was to be used for agricultural purposes. ^{1/}

On June 17, 1999, the Acting Superintendent, Horton Agency, BIA, sent notice of the proposed trust acquisition to the Governor of Kansas and the Treasurer of Jackson County, Kansas. The notice letters invited comments on the proposed acquisition and sought certain information concerning the property, *i.e.*, information as to property taxes, special assessments, governmental services, and zoning. Responses were submitted by Appellant, through its Secretary of Revenue, and by Jackson County, through its County Commissioners.

In its response, Appellant objected to the acquisition on the grounds, among others, that the State and local governments would lose property tax revenue and would receive no compensation for the services it would be required to provide to the tract; that the acquisition was

^{1/} The tribal resolution described the land as follows:

"The North Half of the Northwest Quarter and the Northwest Quarter of the Northeast Quarter of Section 23, Township 8 South, Range 14 East of the 6th P.M., Jackson County, Kansas."

an infringement on Appellant's sovereignty; and that Appellant would have no remedy if the Tribe were to change the use of the land following trust acquisition. Appellant urged that the Tribe be required to use its existing reservation lands for the purposes stated in its trust acquisition request.

The Jackson County Commissioners also objected to the acquisition, citing, among other things, a loss of tax revenue and increased costs to the County caused by the Tribe's casino and other tribal casinos.

On August 3, 1999, the Tribe responded to the comments submitted by Appellant and the County.

On July 17, 2000, the Field Representative, Horton Field Office (formerly Superintendent, Horton Agency), issued notice of his decision to take the land into trust. In the decision letter, he analyzed the acquisition under the criteria in 25 C.F.R. § 151.10. He advised the parties of their right to appeal his decision and enclosed a copy of the Tribe's August 3, 1999, letter responding to the State and County comments.

Appellant appealed to the Regional Director. On December 20, 2000, following briefing by Appellant and the Tribe, the Regional Director affirmed the Field Representative's decision. He included in his decision a further analysis of the acquisition under the criteria in 25 C.F.R. § 151.10. Appellant then appealed to the Board.

In its notice of appeal, Appellant made eleven numbered contentions. These are essentially the same contentions it made in Kansas v. Acting Southern Plains Regional Director, 36 IBIA 152 (2001) (Kansas I), except that it inserted a new contention 4 ("There was no specific finding that the tribe is a landless, agrarian tribe in need of land to farm or ranch." Notice of Appeal at 3); renumbered the remaining contentions; and omitted the last contention made in its notice of appeal in Kansas I (The Regional Director incorrectly stated that the Tribe was in the process of developing a cross-deputization agreement with Appellant and the County). 2/

The arguments in Appellant's opening brief are virtually identical to the arguments it made in its opening brief in Kansas I. Even when ostensibly addressing the specific facts of this acquisition request, Appellant simply repeats the broad allegations it made in the earlier appeal concerning the information submitted by the Tribe and Appellant's supposed lack of opportunity to respond. As in the earlier appeal, however, it is plain in this case that Appellant was given ample opportunity to submit information to BIA and also plain that Appellant failed to offer any evidence to refute the Tribe's evidence.

2/ The Regional Director's Dec. 20, 2000, decision contains the same statement in this regard as the May 1, 2000, decision under review in Kansas I. Thus it appears that Appellant has abandoned its challenge to that statement.

Appellant does not expand on the new contention made in its notice of appeal. Presumably, this contention is related to the argument that 25 U.S.C. § 465 authorizes trust acquisitions only for landless Indians and only for agricultural purposes. That argument was rejected in Kansas I.

For the reasons discussed in Kansas I, the Board declines to consider Appellant's argument that 25 U.S.C. § 465 is unconstitutional and rejects Appellant's remaining arguments except for its argument concerning the Regional Director's reference to the proposed revision of 25 C.F.R. Part 151 published on April 12, 1999, 64 Fed. Reg. 17574.

In his December 20, 2000, decision, the Regional Director made the same statement concerning the proposed regulations that he made in the May 1, 2000, decision under review in Kansas I. There is a factual distinction in this case in that the land at issue here is within the Tribe's reservation and thus would be subject to a new policy for on-reservation trust acquisitions when (and if) the new regulations go into effect. ^{3/} However, the policy which the Regional Director should have followed was the policy reflected in the present 25 C.F.R. Part 151. Because the Regional Director's discussion of the proposed regulations suggests the possibility that he may have been improperly influenced by them, the Board finds that this matter must be remanded for further consideration.

Upon remand, the Regional Director shall re-analyze this trust acquisition under the criteria in the present 25 C.F.R. § 151.10 without taking into consideration any provisions in the proposed revision of Part 151 or any provisions in the final, but not yet effective, revision of Part 151. He may confirm and adopt the analysis in his May 1, 2000, decision to the extent that he finds that the analysis was not influenced by the proposed regulations or finds that he would reach the same conclusion without consideration of the proposed regulations. He is not required to solicit further comments from any party although he may do so if he believes it would assist him in his re-analysis. If he solicits further comments from any party, he shall allow responses by other parties. He shall issue a new decision incorporating his re-analysis.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's December 20, 2001, decision is vacated, and this matter is remanded to him for further consideration.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

^{3/} A final revision of 25 C.F.R. Part 151 was published on Jan. 16, 2001. 66 Fed. Reg. 3452. However, its effective date has been delayed until Aug. 13, 2001. 66 Fed. Reg. 19403 (Apr. 16, 2001).